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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
AETNA EXPLOSIVES COMPANY.
} No. 296.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES, PETITIONER.

STATEMENT OF THE CASE.

This case is here on a writ of certiorari to review a judgment of the United States Court of Customs Appeals (9 Ct. Cust. Appls., 298), which reversed a judgment order of the Board of United States General Appraisers (G. A. 8235, T. D. 37927). The board's decision overruled eight protests against decisions by the collector of customs at Ogdensburg, N. Y., assessing duties upon merchandise imported by respondent. As the case now stands, the claim of the importer (respondent here) for free entry of its merchandise has been sustained and the Government asks that the claim be overruled.

THE FACTS.

NATURE AND USES OF MIXED ACID.

The merchandise was imported in tank cars, each car containing a mixture of sulphuric acid, nitric acid, and water. The mixtures in the various cars varied considerably. In percentages by weight the sulphuric acid varied from 17.01 per cent to 22.65 per cent, and the nitric acid from 68.77 per cent to 77.03 per cent. The average of all the cars was 20.16 per cent sulphuric acid and 72.28 per cent nitric acid, the rest being water. (R. 104½.)

Sulphuric acid has well-recognized uses by itself, not in combination with any other acid. (R. 79–80.) Nitric acid is also used by itself (R. 80, 82), but it is principally used for nitrating purposes in the explosive business and in the dyeing industry. In the explosive business it is always, and in the dyeing industry it is usually, used in combination with sulphuric acid. (R. 79.)

The mixing of nitric acid and sulphuric acid does not result in the formation of a new chemical compound, as the two acids do not interact. (R. 169.) While separation is a chemical possibility (R. 52), yet commercially the expenses and losses make separation impracticable. (R. 40, 52.)

A mixture such as that now before the court is no longer either sulphuric acid or nitric acid (R. 65, 66, 84), and could not be used for the purposes for which either acid is used by itself. (R. 37.) A business man would not accept such a mixture as a good delivery

on an order for either acid. (R. 92.) Respondent's general manager testified that the merchandise now here "could not properly be called nitric acid and it could not properly be called sulphuric acid without qualification;" that "it has ceased to be either;" and that "it is in fact a mixture and would be called a mixture." (R. 65.)

In business transactions mixtures of sulphuric and nitric acids are designated by the term "mixed acid" (R. 95, 96, 100, 101); but it should be noted that the term does not imply a mixture of the acids in any particular proportions. (R. 96, 101.) The trade understanding of the term has been the same throughout the business experience of a witness (R. 100) who has been in the chemical business over 30 years. (R. 97.) Respondent's general manager testified that the terms "strong mixed acid" and "high nitrate mixed acid" are applied to such mixtures as those now in suit. (R. 68.)

In the instant case the invoices describe the merchandise as "mixed acid"; and, when making entry thereof at the customhouse, respondent in each instance described it as "mixed acid." In the court below respondent explained that the merchandise was invoiced as mixed acid because the regulations of the Interstate Commerce Commission "prohibited describing them as nitric acid."

The Interstate Commerce Commission uses the term "mixed acid" in the item "acid, nitrating (mixed acid)" in its list of principal dangerous articles. (See insert opposite R. 110.)

In short, the mixing of sulphuric and nitric acids produces a new article differing from its original constituents in character, name, and use.

The term "mixed acid" is not applied to a mixture of any other acids. (R. 35.)

Mixed acid has long been the subject of commerce. On various occasions when it could not produce enough nitric acid for its own purposes respondent has gone into the market and purchased mixed acid (R. 41, 66–67), and the making of contracts for its purchase seem to have been in the regular routine of respondent's business. (R. 67.) Respondent has also been a seller of mixed acid. (R. 61–62.)

In addition to respondent there are other importers of mixed acid. (R. 22, 101-103, 134-140, 140-154, 155-183.)

That the transactions in mixed acid are numerous is shown by the testimony by the attorney of a chemical company (R. 143) that he draws "hundreds of mixed acid contracts." (R. 149.)

Stated concisely, the record shows that mixed acid has long been the subject of both domestic and international trade.

It has already been noted that the term "mixed acid" does not indicate any particular percentage of acids in the mixture. Contracts for the purchase and sale of mixed acid cover mixtures of "different proportions." (R. 149.) The purchaser specifies the percentage of nitric and sulphuric acid he wants and the price is based on those percentages. (R. 99, 149.) The purchaser buys combinations which

suit his own special needs (R. 94, 148), thus avoiding the trouble of combining the acids in his own plant. (R. 94.) Trade journals (such as the "Oil, Paint, and Drug Reporter") in quoting prices of mixed acid give the price as so much per unit of sulphuric acid and do much per unit of nitric acid.

When mixed acid is to be used as a nitrating acid (as in the manufacture of explosives) it contains from 60 per cent to 75 per cent of sulphuric acid (R. 71, 80); but different strengths of nitrating acids are used. (R. 94.) When used as a fortifying acid (i. e., to bring up the spent acids remaining after the nitrating processes) a mixed acid usually contains between 47 and 50 per cent of nitric acid. (R. 71.)

So far as the record discloses, such a mixed acid as that in suit (i. e., one containing about 20 per cent of sulphuric acid and 70 per cent of nitric acid) is not used *directly* in any manufacturing process. (R. 32.) Before use it is diluted by the addition of more sulphuric acid. (R. 33, 137.)

That mixed acid with a low sulphuric-acid content is bought and sold was clearly demonstrated by respondent's general manager. He testified that in 1916 the respondent "always purchased that strong nitric acid mixed with sulphuric acid with a minimum of sulphuric" (R. 41); and also that at different times respondent had gone into the market and bought mixtures containing the same percentages of acids as the mixture now in suit. (R. 66–67.) In view of the facts about transportation to which reference will be made shortly and the whole tenor

of the record, it is a fair and reasonable assumption that the material sold by respondent to the Government, to which reference is made at the bottom of page 61 and top of page 62 of the transcript of record, was a similar mixture.

Bearing in mind that in the instant case the average value of the sulphuric-acid content of the imported mixture was 5.04 per cent of the total value (R. 104½), one is justified in assuming (as did respondent's counsel at the trial herein at page 22 of the transcript of record) that the Benzol Products case involved another purchase and importation of a mixed acid with a low sulphuric-acid content. The record in that case was made a part of the record in this case. (R. 101–102.) In that case the value of the sulphuric acid was 3 per cent of the total value. (R. 135–136.)

In approaching the commercial advantage of sometimes buying a mixed acid with a low sulphuric-acid content, one has to consider certain chemical effects as affecting the transportation of nitrating material. Anhydrous nitric acid does not attack iron and steel, but ordinary nitric acid (which always contains water) has a strong corrosive effect on them. (R. 72–73, 77–78.) Because of its corrosive effect, the transportation of nitric acid by freight is permitted only in glass containers. (R. 70, 119.) But, for reasons which seem not to be definitely known, mixed acid does not corrode iron and steel. It may be that when nitric and sulphuric acids are mixed the sulphuric acid takes up the water of the nitric acid, leav-

ing an anhydrous nitric acid that does not attack the metal. (R. 73, 26.) Another theory is that the sulphuric acid acts upon the iron and coats the surface thereof with an insoluble basic salt of iron, which protects the metal from corrosive action by the nitric acid. (R. 173.) Hence, mixed acid may be transported by freight in iron drums, in tank cars, or in glass carboys. (R. 120.)

It is obvious that one needing to buy large quantities of nitrating material will find it advantageous to buy a mixed acid which can be transported in tank cars rather than to buy nitric acid which can be transported only in glass containers. If he bought nitric acid, he would afterwards add sulphuric acid to it. So it is better to buy mixed acid in the first instance and thus secure the advantage of a lower transportation cost. About three-quarters of all nitric acid shipped is first converted into mixed acid. (R. 81.)

REASONS FOR RESPONDENT'S IMPORTATION OF MIXED ACID.

In 1917 respondent contracted to make a large quantity of trinitrotoluol for the Navy Department. (R. 58.) At its plant at Emporium, Pa., respondent had facilities for making the trinitrotoluol; but neither at that plant nor elsewhere in the United States could it then produce a sufficient amount of nitric acid for the purposes of the contract. (R. 19, 58, 61.) Consequently, respondent utilized an idle nitric-acid plant which it had in Canada. (R. 58, 61.)

At that plant respondent first manufactured nitric acid and oleum out of materials shipped there from the United States. (R. 61, 64.) Oleum may be described as a supersaturated form of sulphuric acid having a strength equivalent to 104½ per cent sulphuric acid. (R. 27, 38, 39, 51.) It is produced by the introduction of SO_3 gas into sulphuric acid. (R. 39.) Then the oleum was put in a tank which was "operated with agitation and cooling"; and the product of the nitric-acid plant was run into that tank. (R. 39.) The anhydrous SO_3 gas of the oleum united with some of the water in the nitric acid forming sulphuric acid additional to that already in the oleum. (R. 27, 39, 46.) There were resultant changes in the specific gravity and characteristics of the nitric acid. (R. 39–40.) The final product was the imported mixed acid, consisting of sulphuric acid, nitric acid, and water. (R. 21, 36, 104½.)

After importation more sulphuric acid was added at the Emporium plant, thus bringing the mixture to the required strength for nitrating purposes. (R. 32, 47, 64.)

Respondent insists that it had no desire to import sulphuric acid from Canada, as such acid could have been procured in this country at an equal or perhaps lower price, and perhaps at a lower cost for freight. (R. 32, 45, 65.) Respondent's general manager testified (R. 24):

> Our purpose was to add to the nitric acid produced in our plant in Canada the minimum amount of sulphuric acid which would insure

> its safe transportation in tank cars as that was the only manner in which we could successfully and practically transport the nitric acid which we could produce in Canada and which we had to use in the United States.

Thus it is evident that while respondent might have been willing to procure all its sulphuric acid in this country, yet the disadvantage of bringing some of it from Canada was more than offset by the advantage of utilizing the Canadian plant.

At a later point respondent's manager gave some testimony indicating that the desire to have the mixed acid "construed as not coming under the dutiable clause" may possibly have influenced respondent to import a mixed acid containing "a minimum of sulphuric." (R. 58.)

It was recognized by petitioner in its brief below and by the court in its opinion (R. 214) that a mixed acid with a higher sulphuric-acid content (as a nitrating acid or a fortifying acid) would unquestionably have been dutiable. (See p. 19 post.)

Respondent's general manager seems to have been indifferent as to what percentage of sulphuric acid was used. (R. 90.) In one instance there was only 17.01 per cent of sulphuric acid (R. 104½), although it was the consensus of opinion that 25 per cent was necessary to safeguard steel containers. (R. 74, 84.) Respondent was using its own cars and respondent's manager insisted that, even against the advice of others, he was willing to risk them in order to save cost on the sulphuric acid (R. 43, 44–45); but the

question of duties was under consideration (R. 58), and it is submitted that the possibility of avoiding duties may have been a factor equally as potent as the possibility of making a small saving on the cost of sulphuric acid.

THE NAVY DEPARTMENT WAS NOT INTERESTED IN THE QUESTION OF DUTIES.

On a hurried reading of the testimony on page 58 of the transcript of record one might get the impression that one of the "terms" of respondent's contract with the Navy Department was that some of the raw material should be manufactured in Canada; and perhaps also that the Navy Department was interested in the question as to customs duties. However, a closer reading of the testimony shows that it was not a "term" of the contract that the nitrating material should come from Canada. The Navy Department wanted trinitrotoluol, but probably it did not care where the nitrating material originated.

Had the Secretary of the Navy so desired, he could have secured free entry for the imported material under the act of June 30, 1914 (38 Stat. 399); but he did not secure free entry for it.

The question of duties seems to have first come up after the making of the contract. It was the representatives of respondent who had "a little bit of theory" that mixed acid with a low sulphuric-acid content "would be construed as not coming under the dutiable clause." (R. 58.)

HISTORY OF THE LITIGATION.

The merchandise was assessed with duties under paragraph 5, tariff act of 1913 (38 Stat. 114), which reads:

> 5. Alkalies, alkaloids, and *all chemical* and medicinal compounds, preparations, *mixtures* and salts, and combinations thereof not specially provided for in this section, 15 per centum ad valorem. [Italics ours.]

Against that assessment of duty the importer (respondent here) filed statutory protest under paragraph N, Section III, tariff act of 1913 (38 Stat. 187). It is interesting to note that in each protest respondent referred to the merchandise as "the *mixed acid* in question." In its protests respondent claimed that the merchandise is entitled to free entry "as sulphuric acid or nitric acid" under paragraph 387, tariff act of 1913. (R. 5–15.) That paragraph reads:

> 387. Acids: Acetic or pyroligneous, arsenic or arsenious, carbolic, chromic, fluoric, hydrofluoric, hydrochloric or muriatic, *nitric*, phosphoric, phthalic, prussic, silicic, *sulphuric* or oil of vitriol, and valerianic. [Italics ours.]

When submitting the protests to the Board of General Appraisers, the collector of customs in each instance called the merchandise "mixed acid." (R. 6–15.)

The Board of General Appraisers overruled the protests. (R. 199.)

Though in its protests respondent had claimed that the merchandise is entitled to free entry "as *sulphuric acid or nitric acid*," yet by its assignment of errors on appeal to the Court of Customs Appeals respondent seems to have limited its contention. The second assignment is that the board erred in holding that the merchandise was not free of duty "*as nitric acid.*" (R. 2.) The petition for review made no specific reference to the claim for free entry as "sulphuric acid." The third assignment of error read (R. 2):

> 3. In holding that the addition of sulphuric acid to nitric acid, made solely for the purpose of protecting the tank car in which the nitric acid was to be shipped, and solely in compliance with the regulations for the transportation of explosives and other dangerous articles by freight adopted by the Interstate Commerce Commission, and in proportions having no known trade use, subjects the nitric acid desired to be transported to duty at 15 per cent ad valorem, under paragraph 5 of the tariff act of 1913, as a chemical mixture.

The Court of Customs Appeals recognized that the imported merchandise was "technically" a chemical mixture and so "within the letter of the statute" (i. e., paragraph 5, under which it had been assessed); but on the assumption that the merchandise was "not within the statute because not within its spirit nor within the intention of its makers," the court held that the merchandise was not "such a mixture as is contemplated by the statute." The court said "that the true rule is that the introduction of a

quantity of sulphuric acid solely for the purpose of rendering the transportation of nitric acid safe, and which does not result in a usable mixture, is more in the nature of an act of shipment than an admixture and does not produce a substance which is dutiable under paragraph 5." (R. 219–220.) As the court said, its decision was determined by "the purpose of the importation" rather than by "the nature of the article imported."

At the conclusion of its opinion the Court of Customs Appeals said "that the case is not wholly free from doubt," and "that in such case the construction of the statute most favorable to the importer is to be adopted." (R. 220.)

THE ISSUE.

It is well established that ordinarily the dutiable classification of imported merchandise must be determined solely by its condition at the time of importation. The ultimate question in this case is whether a different rule should apply to the merchandise now before the court because of the motives which impelled this particular manufacturer to import it.

ARGUMENT.

I.

The decision of the Court of Customs Appeals was largely based on a wrong impression as to undisputed facts.

A. *The court mistakenly assumed that there was a regulation of the Interstate Commerce Commission*

which required respondent to convert its nitric acid into a mixed acid containing 20 per cent of sulphuric acid.

In stating the facts the opinion of the court below said (R. 205):

> For the purpose of protecting the iron tank cars in which the necessities of their business required them to import this nitric acid, it was necessary to add about 20 per cent of sulphuric acid. The *regulations of the Interstate Commerce Commission* in force at the time *required* that this addition to the nitric acid should be made before shipment in tank cars would be permitted. The record in the case shows that *only enough sulphuric acid was added to comply with this regulation,* * * *. (Italics ours.)

In the course of its opinion (R. 210) the court referred to the imported merchandise as "this mixture which in a sense is involuntary, *it being a compliance with the regulation which made it possible to import the article into this country.*" At a later point (R. 219) the opinion referred to the acids "mixed only *for the purpose of observing the requirements of the Government* as to shipment." Near the end of its opinion the court said (R. 220) that "in every case regulations of the Interstate Commerce Commission, it may be assumed, are within the knowledge of the revenue officers, and the proper tests may be made to ascertain the character and nature of the importation."

Thus it is evident that the court's opinion was largely based on the assumption that to certain nitric acid respondent added sulphuric acid in com-

pliance with a regulation of the Interstate Commerce Commission which "required that this addition to the nitric acid should be made before shipment in tank cars would be permitted."

There is no regulation to that effect. The regulations merely prescribe the containers in and conditions under which certain commodities may be transported by freight. Regulation 1857 (R. 119) relates to one commodity, viz, nitric acid. Regulation 1858 (R. 120) relates to another commodity, viz, mixed nitric and sulphuric acids, which may be transported in iron drums, in tank cars, or in carboys.

The regulations neither require nor suggest the addition of sulphuric acid to nitric acid. Of course the owner of nitric acid may, if he chooses, convert it into mixed acid; and under certain conditions doubtless it is advantageous for him so to do. The regulation relating to the shipment of mixed acid does not require that such mixtures contain 20 per cent or any specified amount of sulphuric acid.

B. *The court mistakenly assumed that the merchandise was not a "usable mixture," was not a "commercial mixture," and was not "merchantable."*

One premise which led to the final conclusion of the court below was that the imported mixed acid was not a "usable mixture" (R. 220); i. e., not "adapted to use as such". (R. 219.) It is submitted that the merchandise was "usable," because it was in fact used by the importer. It is immaterial that it had to be further diluted with sulphuric acid before

it could be used as a nitrating acid. Many dutiable materials have to be further processed before they reach the final step in manufacturing processes. Congress did not limit the chemical mixtures of paragraph 5 to those which are ready for their final use. Hence, the courts should not create such a limitation.

The court said that the imported merchandise "had not reached the state of a *commercial* mixture contemplated by the statute," and "was not a mixture *merchantable* as such for use in the United States." (R. 211.) In the statement of facts herein it has been pointed out that mixed acid with a sulphuric-acid content comparable with the merchandise now before the court has long been bought and sold in commerce (pp. 4–6 ante).

With its false premises eliminated there is left little, if any, basis for the conclusions reached by the court below.

II.

It is undisputed that the imported merchandise was a chemical mixture within the meaning of the provision for "all chemical * * * mixtures" in paragraph 5, tariff act of 1913.

Some of the chemists who testified were not familiar with the term "chemical mixture," saying it is not used in textbooks or the science of chemistry. (R. 167, 173.) To them the instant merchandise was only a mechanical mixture of chemicals. (R. 84.) But, in the language of the layman, such mechanical mixtures are known as chemical

mixtures as distinguished from chemical combinations, in which the ingredients unite by chemical attraction and lose their own distinct properties. The following definition of "mixture" is taken from the Century Dictionary:

> 4. In chem., a blending of several ingredients without chemical alteration of the substances, each of which still retains its own nature and properties; distinguished from combination, in which the substances unite by chemical attraction, lose their distinct properties, and form a compound differing in its properties from any of the ingredients.

That the instant merchandise is a "chemical mixture," as that term is used in the tariff acts, has been settled by judicial determination. (*Strohmeyer & Arpe* v. *United States*, 2 Ct. Cust. Appls., 285, 287.)

The Board of General Appraisers found that the instant merchandise was "a mixture" within the paragraph of the tariff act under which it had been assessed. (R. 195.) In its brief before the Court of Customs Appeals respondent admitted "that any mixture of nitric acid and sulphuric acid in any proportions, like any other mixture of two or more chemicals where no chemical reaction is caused by the mixture so as to produce a chemical compound, is a chemical mixture within the literal meaning of paragraph 5, although several chemists testified in the several cases embodied in this record that there is no such thing in the science of chemistry as a chemical

mixture." The Court of Customs Appeals recognized that the instant merchandise "might technically be called a mixture" (R. 209) and is "within the letter" of the statute.

Hence, in this case it now stands as a fact that the imported merchandise is a chemical mixture within the meaning of the provision for "all chemical * * * mixtures" in paragraph 5, tariff act of 1913.

III.

The dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported.

"The rule is well established that in order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." (*United States* v. *Citroen*, 223 U. S. 407, 414; *Dwight* v. *Merritt*, 140 U. S. 213, 219; *Worthington* v. *Robbins*, 139 U. S. 337, 341; *United States* v. *Schoverling*, 146 U. S. 76, 82.) In *United States* v. *Citroen*, 223 U. S. 407, 415, this court said: "The inquiry must be—Does the article, as imported, fall within the description sought to be applied?"

It has been shown in this brief that the imported mixed acid, in the condition in which it was imported, was a chemical mixture and as such fell within the description "all chemical * * * mixtures" in paragraph 5. It will be noted that this provision is

without limitation of any kind, and that by its own terms it applies to "*all* chemical * * * mixtures."

IV.

The motives which actuate the manufacture and importation of merchandise do not affect its dutiable classification.

The court below recognized (R. 214) that both (1) a mixed acid which could be used directly for nitrating purposes, and (2) a mixed acid which could be used as a fortifying acid would be dutiable as a chemical mixture under paragraph 5. But the court held that the mixed acid now before the court is not so dutiable. The court differentiated the instant mixture because the court was of the opinion (1) that the mixture is not a "usable mixture" and (2) that the mixture was made "solely for the purpose of rendering the transportation of nitric acid safe." (R. 219–220.) It has been pointed out (pp. 15–16 hereof) that the imported mixed acid was a "usable mixture," a "commercial mixture," and a "merchantable" commodity.

Even if it were true that the imported mixed acid were not a "usable mixture," and were not "merchantable," yet those facts would not affect the dutiable classification of the instant merchandise. As was said by this court in *Dwight* v. *Merritt*, 140 U. S. 213, 219, questions of utility and adaption of the merchandise imported do not enter into the decision of the collector in determining its dutiable classification.

It has also been pointed out herein (p. 9, ante) that there may be ground for questioning whether the merchandise was made "solely for the purpose of rendering the transportation of nitric acid safe."

But assuming, for the argument, that respondent's sole purpose in making the mixture was what the court below says, does that psychological factor take the merchandise out of the rule that the dutiable classification of merchandise must be ascertained by an examination of the merchandise itself, in the condition in which it is imported?

Even if an article be manufactured or prepared for the express purpose of being imported at a lower rate of duty, nevertheless its dutiable classification must be determined by the condition of the article itself at the time of importation. (*Seeberger* v. *Farwell*, 139 U. S. 608; *Merritt* v. *Welsh*, 104 U. S. 694, 701, 704; *United States* v. *Citroen*, 223, U. S. 407, 415.) This has long been the law. (*United States* v. *Levitt*, 26 Fed. Cas. No. 15594, p. 919.) In a case where into the warp of a fabric otherwise made of wool there was introduced such a small percentage of cotton that the cotton could be discovered only by chemical analysis this court held that the cotton determined the dutiable status of the fabric. (*Magone* v. *Luckemeyer*, 139 U. S. 612.) Stated in another way, the dutiable classification of imported merchandise is not affected by the purpose of the producer.

Likewise, the dutiable classification is not affected by the importer's intent at the time of importation.

In one case gunstocks with mountings complete, ready for attachment to barrels, were imported. The importer had arranged with another firm to import the barrels. The court said that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, can not affect the rate of duty on gunstocks as a separate importation." (*United States* v. *Schoverling*, 146 U. S. 76, 81.)

As the dutiable classification of articles imported is not affected by the purpose of the producer or the intent of the importer, but must be ascertained by an examination of the imported article, it follows that the instant merchandise must be classified according to its condition at the time of importation without reference to what the court below called "the purpose of the importation." It is immaterial whether respondent was trying to avoid the production of a dutiable commodity or attempting to render the transportation of nitric acid safe. Whatever may have been respondent's motives or "the purpose of the importation," the dutiable classification of the merchandise inported must be ascertained by an examination of the merchandise itself, in the condition in which it was imported.

V.

The dutiable classification of chemical mixtures does not depend upon the use to be made thereof.

Often Congress makes the dutiable classification of imported merchandise depend upon the use to which

imported merchandise is to be put. (Pars. 210, 380, 391, 427, 494, 501, 551, 573, 611, 653, and 654, tariff act of 1913, 38 Stat., 114.) But use is not a criterion for determining whether an imported article is dutiable under paragraph 5.

VI.

This is not a case for the application of the rule that a thing may be within the letter of the statute and yet not within the statute.

The court below considered this "a clear case for the application of the rule that a thing may be within the letter of a statute and yet not within the statute because not within its spirit nor within the intention of the makers." (R. 220.)

The intention of the statute makers is best shown by the statute itself. In the statutory expression "all chemical * * * mixtures" Congress used apt terms. There is no obscurity or ambiguity. It must be presumed that when it used that expression in the tariff act of 1913 Congress did so with full knowledge of the customs and usages of the chemical business in all its branches, and with full knowledge of the regulations of the Interstate Commerce Commissions relating to freight transportation which had been in existence since 1911 and perhaps since 1909. (R. 69.) Hence, there is no ground for asserting that a substance which falls within the provision for "all chemical * * * mixtures" is not within the statute. Courts "are not at liberty to disregard the condition upon which the law makes the duty de-

pend." (*Frankenberg* v. *United States*, 206 U. S. 224, 225.)

Congress may have made "all chemical * * * mixtures" dutiable while leaving certain ingredients thereof free of duty, because of a policy of protecting our industries and our laborers; but there is no need to speculate upon the motives which actuated the legislature. It is sufficient that Congress has drawn the line where it has. In *Merritt* v. *Welsh*, 104 U. S. 694, this court said (at p. 701):

> The color standard has come to be a precarious one. Still, if the Government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties.

And in that case the court further said (at pp. 702–703):

> It is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used.

And the court further said (at p. 705):

> A better remedy than that of making a forced construction of the law is in the power of Congress. All that has to be done is, to

change the law so as to reach the goods in their new form, if it is thought desirable to do so. If the law is found defective, let it be altered so as to attain the result desired.

VII.

The decision below fixes no definite standard by which collectors of customs can determine the dutiable classification of mixed acid.

Evidently the court below thought that collectors of customs can determine the dutiable classification of a mixed acid by making a "proper test" to ascertain whether "the nature and character of the importation" meet the "regulations of the Interstate Commerce Commission." (R. 220.) Here is another demonstration of the fact that the court was mistaken as to those regulations.

As was pointed out on pages 13–15 hereof, those regulations set up no standard whatever. They prescribe no percentage of sulphuric acid which must be used. For some time before the trial there had been experiments to find out the least amount of sulphuric acid necessary to protect iron from nitric acid, but the experiments had not been completed. (R. 73.) Examination of the latest regulations issued by the Interstate Commerce Commission show that up to the present time no standard has been set. Consequently, "the proper test" adopted by the court below is merely the intangible, psychological "purpose of the importation."

The court below sought to distinguished between dutiable and nondutiable mixed acids by drawing a "line between mixtures made solely for the purpose of importation and mixtures which were usable." (R. 214.) The court assumed that a mixed acid containing 20 per cent of sulphuric acid meets the requirements of the Interstate Commerce Commission. The chemical expert of the Bureau of Explosives testified that it was the general consensus of opinion that 25 per cent of sulphuric acid is necessary to safeguard steel containers. (R. 74.) The record shows that the lowest percentage of sulphuric acid in what the court below calls a "usable" acid is 47 per cent. (R. 71.)

It is conceivable that there may be importations of mixed acids containing 30 per cent or 35 per cent or 40 per cent of sulphuric acid. Such a mixed acid would not be "usable," as that term is used by the court below; and yet the introduction of such a quantity of sulphuric acid would not be "solely for the purpose of rendering the transportation of nitric acid safe." How would the customs officers classify such importations? It is evident that the decision of the court below does not furnish a test for distinguishing between dutiable and nondutiable mixed acids.

Even as to a mixed acid of the exact proportions of those now in suit, the rule of the court below does not furnish an accurate test. A manufacturer of explosives who has his own supply of sulphuric acid may import such a mixture solely for the purpose of

getting the nitric acid. Under the court's rule such an importation would be free of duty. On the other hand, a dealer in chemicals who needs both acids may import a similar mixed acid for the purpose of selling it to a customer who has no supply of sulphuric acid. Would not such an importation be dutiable under the rule that the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported? It can not be the law that an article imported by one importer is free while a similar article imported by another is dutiable.

Some of the results which might flow from the decision below may be illustrated by a simple example. In some future tariff act sulphuric acid may be placed in the dutiable list and nitric acid in the free list, as was the case under the tariff act of 1909. (See pars. 1 and 482 of the tariff act of 1909, 36 Stat., 11.) If there should be imported a mixture such as that at bar, then a commodity containing at least one-fifth of a dutiable ingredient (i. e., sulphuric acid) would, pursuant to the decision below, be entitled to free entry.

In making "the *purpose* of the importation" its test the court set up a will-o'-the-wisp standard. As was said by this court in *Merritt* v. *Welsh*, 104 U. S., 694, 702:

> Uncertainty and ambiguity are the bane of commerce. Discretion in the customhouse officer should be limited as strictly as possible. It has been said with much truth, "Where law ends, tyranny begins."

VIII.

The decision below is in conflict with a rule which has long had both legislative and judicial approval.

In 1899 the Board of General Appraisers considered the proper classification of crushed or ground medicinal leaves immersed in alcohol. Though the issue was not directly involved, yet there was discussion as to whether the merchandise constituted an "alcoholic compound." (*Otis Clapp & Son's* case, T. D. 20516.) The Treasury Department concurred in the dissenting general appraiser's view that there was a "compound," and directed a collector of customs to conform his "practice thereto and classify like commodities as alcoholic compounds." (T. D. 20711.) As a consequence there arose *Boericke & Runyon Company's* case, involving certain leaves and roots in alcohol which had been assessed with duties under a provision for "alcoholic compounds." In 1901 the Board of General Appraisers overruled the protest against that assessment. (T. D. 23354.) In 1903 that decision was reversed by the Circuit Court for the Southern District of New York, the court saying (*Boericke & Runyon Company* v. *United States*, 126 Fed., 1018, 1019):

> As imported, the merchandise either consists of natural fresh leaves and roots, kept in that condition for transportation and subsequent use as such, the leaves and roots being substantially the thing imported, and the alcohol a mere vehicle, of no more importance than the cask in which they are packed; or

> else it consists of the leaves and roots and the alcohol as the factors in a loose and temporary association for the purpose, as aforesaid, of maintaining the roots and leaves in their natural condition and fit to subserve their intended use. On either analysis, it is manifest that there is here no combination, no new whole, no compound body, no union, and no elements, ingredients, or parts so put together as to produce, by combination or otherwise, anything.

Such was the legal situation when there was presented a similar issue in Stone & Downer's case. "Desiring to conform to" the *Boericke & Runyon* decision, the Board of General Appraisers in 1906 sustained importer's protest. (Abstract 11235, T. D. 27348.) In May, 1909, the Circuit Court for the District of Massachusetts affirmed the board's decision on the authority of the *Boericke & Runyon* case. (*United States* v. *Stone & Downer*, 171 Fed. 238.)

It was soon made evident that this judicial limitation of the expression "alcoholic compounds" was not acceptable to the Congress. In Notes on Tariff Revision, prepared for the use of the Committee on Ways and Means, House of Representatives, 1908, attention was directed (at pp. 13–14) to the *Boericke & Runyon* case and the then pending *Stone & Downer* case; and the comment was made that the classification directed therein was "at variance with the manifest intention of Congress." In accord with a suggestion in Notes on Tariff Revision, Congress

overcame the effect of the above-cited judicial decisions by adding to the words "alcoholic compounds" the words "including all articles consisting of vegetable, animal, or mineral objects immersed or placed in, or saturated with, alcohol." (Par. 2, tariff act of Aug. 5, 1909, 36 Stat., 12.) In the tariff act of 1913 the phraseology is somewhat different, but such articles are therein coupled with alcoholic compounds. (Par. 16, tariff act of 1913, 38 Stat. 115.)

Subsequently it was judicially determined in the *Stone & Downer* case that the limitations placed by the Circuit Courts upon the expression "alcoholic compounds," when standing alone, did not accord with the congressional intent. In December, 1909, the Circuit Court of Appeals for the First Circuit reversed the Circuit Court and held that the imported merchandise was dutiable under the provision for "alcoholic compounds." (*United States* v. *Stone & Downer*, 175 Fed. 33.)

In the instant case respondent's principal argument below was parallel to the argument of the importers in the *Boericke & Runyon* and *Stone & Downer* cases. Though there had been congressional disapproval of the *Boericke & Runyon* decision and the first *Stone & Downer* decision, and though finally in the *Stone & Downer* case the Circuit Court of Appeals had overruled the importer's contention, yet in the instant case the Court of Customs Appeals sustained that parallel argument. In the *Stone & Downer* opinion the Circuit Court of Appeals specifi-

cally disapproved the contention that the alcohol was "a mere vehicle" for the vegetable matter immersed therein. In the instant case the court said that the mixing of the sulphuric acid with the nitric acid "should be treated * * * as an act as essential in the importation of nitric acid as would have been the proper packing of glassware or other goods designed for shipment by rail."

It is pertinent to note that ordinarily "packing for glassware or other goods" is discarded when the merchandise is used. But in the instant case the imported mixture was used as imported, more sulphuric acid being added to it.

Though the court's opinion in the instant case attempts to distinguish the *Stone & Downer* case (R. 214–218), yet it is submitted that no sound distinction has been drawn.

In the instant case the court said that the imported merchandise is "not a mixture merchantable as such for use in the United States"; and that what the statute "meant was, as we think, a mixture which is adapted to use as such." The court's decision was largely influenced by the fact that for commercial purposes more sulphuric acid had to be added to the imported merchandise.

In the *Stone & Downer* case not only was it commercially impracticable to segregate the leaves and the alcohol, but also before being put to their ultimate use the leaves had to be further macerated and more alcohol had to be added. In that case it might equally well have been said that at the time of im-

portation the alcoholic compound was not "merchantable as such for use in the United States," and was not "adapted to use as such." In neither case at the time of importation was the merchandise ready for its ultimate use. In principle the two decisions are in irreconcilable conflict.

IX.

In no event is the merchandise free of duty under paragraph 387, tariff act of 1913.

The protests claim that the merchandise which they describe as "mixed acid" is free of duty "as sulphuric acid or nitric acid." The petition to the Court of Customs Appeals alleged that the Board of General Appraisers erred in not holding the merchandise entitled to free entry "as nitric acid."

It is clear that the merchandise is no longer nitric acid. By a process of manufacture it has become something else. Hence it is not classifiable under the provision for "nitric acid" in paragraph 387.

It is a fundamental of tariff litigation that to succeed a protestant must establish not only that the collector's classification was wrong but also that the claim of the protest is right. If he establishes that the collector's classification was wrong but fails to establish that his own claim is right, then his protest must be overruled. (*Benjamin Iron & Steel Co.* v. *United States*, 2 Ct. Cust. Appls., 159, 160.)

Let us assume, for the argument, that the imported merchandise is neither a chemical mixture dutiable

under paragraph 5 nor nitric acid entitled to free entry under paragraph 387. In that event it might be dutiable as a partly manufactured unenumerated article under paragraph 385 of the tariff act of 1913. But be that as it may, the protest would have to be overruled because of the failure to establish the claim of the protest. Hence, if the merchandise in the case at bar is not nitric acid, the decision of the court below was wrong.

CONCLUSION.

The decision of the United States Court of Customs Appeals should be reversed and the decision of the Board of United States General Appraisers should be affirmed.

BERT HANSON,
Assistant Attorney General.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, Petitioner, vs. AETNA EXPLOSIVES COMPANY, Respondent.	No. 296.

BRIEF OF RESPONDENT.

This is a writ of certiorari allowed to review a judgment of the Court of Customs Appeals (9 Ct. Cust. App., 298), which unanimously reversed a judgment of the Board of U. S. General Appraisers (T. D. 37927, G. A. 8235).

Preliminary Statement.

The Aetna Explosives Company imported at the Port of Ogdensburgh, N. Y., in November and December, 1917, and January, 1918, fifteen tank cars containing nitric acid, which it had shipped by rail from its plant at Drummondville, Canada, to its plant at Emporium, Pa. *Solely in order to protect the iron tank cars from the corrosive and destructive effect of the nitric acid,*

and in obedience to Sections 233 and 235 of the U. S. Penal Code and the Regulations of the Interstate Commerce Commission adopted thereunder, which prohibited the transportation of nitric acid in tank cars otherwise, only enough sulphuric acid was added to the nitric acid in order to make it possible to transport the nitric acid in the tank cars safely and legally.

The Collector of Customs, holding that the addition of the sulphuric acid to the nitric acid resulted in a chemical mixture within the meaning of Paragraph 5 of the Tariff Act of 1913, notwithstanding that such addition was compelled, under penalty of fine and imprisonment, by the Penal Code and the Interstate Commerce Regulations, assessed the contents of the cars with the duty of 15% ad valorem imposed by the said paragraph upon "all chemical * * * mixtures."

The importer duly protested, claiming the contents to be free of duty under Paragraph 387 as nitric acid, or as nitric acid and sulphuric acid, and paid the duties as assessed. The protests were regularly brought on for trial before the Board of U. S. General Appraisers, in accordance with the legal procedure provided by the Tariff Act for the recovery of duties illegally exacted and paid under protest, which, after a full hearing, overruled the protests and rendered judgment for the Government by a vote of two to one, Brown, G. A., dissenting (Rec., 183-199). This judgment was, upon appeal by the importer, unanimously reversed by the Court of Customs Appeals, which rendered judgment in favor of the importer (Rec., 204-221), and this latter judgment has now been brought here by the Government for review.

The Facts.

Anhydrous, chemically pure nitric acid is very seldom manufactured; practically all the nitric acid manufactured is a mixture of nitric acid and water, the common or commercial kind containing about 67% nitric acid and 33% water, and high strength nitric acid, the strongest and purest generally made, containing about 90% nitric acid and 10% water (Rec., 70, 76-77, 77-78, 98-99, 53). The great danger in transporting nitric acid is the fire hazard and the stronger the acid the greater is the danger of fire if the container should break (Rec., 79).

All nitric acids very strongly attack iron or steel; the greater the percentage of water, up to a certain point, the greater is the corrosive effect. *Consequently, nitric acid alone cannot be shipped in tank cars, which are always made of iron or sheet steel, as it would very shortly eat holes through the cars and destroy them* (Rec., 69, 72, 73, 77-78, 25, 169, 180, 181).

For some time it has been known that the addition of sulphuric acid to nitric acid acts as a protection to the car and prevents the nitric acid from eating it, although the chemical reason for this result is not yet known (Rec., 26, 73, 136, 138, 173).

It has been the general consensus of opinion that the addition of about 25% by weight of sulphuric acid was necessary in order to fully protect the iron or steel car, and that 20% was as small a percentage as could be added with safety to the car, was perhaps even under the limit of safety (Rec., 74, 84, 43, 51).

The fifteen tank cars imported here contained, on the average, 20.16% (from 17.01 to 22.65) of

sulphuric acid by weight and 72.28% (from 77.03 to 68.77) of nitric acid, the balance being water. (By value the proportions were, on the average, 5.04% (from 4.25 to 5.66) of sulphuric acid and 94.96% (from 95.75 to 94.34) of nitric acid) (Ex. 1, Rec., 104).

Sections 233 and 235 of the U. S. Penal Code of March 4th, 1909, imposed upon the Interstate Commerce Commission the duty of formulating regulations "for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land" and which "shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit," etc., and prohibit the delivery to any common carrier of any explosive or dangerous article under a false or deceptive marking, description, invoice, shipping order or other declaration and make a violation of any of the aforesaid provisions, or of any regulation made by the Commission in pursuance thereof, punishable by a fine of not more than $2,000, or imprisonment of not more than 18 months, or both.

Acting under the authority of these sections the Interstate Commerce Commission promulgated, at least as early as 1911 (Rec., 69, 76), a set of "Regulations for the Transportation of Explosives and Other Dangerous Articles by Freight" which, with possibly some slight changes in detail (but no essential changes in regard to acids), have been in effect ever since. Nitric acid was classified therein as a corrosive liquid and as a dangerous article (Rec., 108, 110). The Regulations are printed at pages 105-133 of the Record.

The only paragraphs of any interest here are Nos. 1701, 1702, 1703, 1704, 1711, 1712, 1800, 1805, 1807, 1851, 1852, 1857, 1858, 1867 and 1871. Paragraphs 1857, 1858 and 1867, which relate to nitric acid particularly, are as follows:

"1857. (a) Special attention must be given to bottles or vessels of any kind used for nitric acid. The following containers are authorized for shipment of nitric acid of the specific gravity stated:

(1) Glass bottles not exceeding 7 pounds capacity, in metal containers. All gravities.

(2) Glass bottles not exceeding 7 pounds capacity. Not to exceed 1.49 gravity.

(3) Glass carboys, Specification No. 1. Not to exceed 1.43 gravity.

(4) Glass carboys, metal covered. Not to exceed 1.49 gravity.

(b) All glass bottles, (1) and (2), must have glass stoppers ground to fit and these stoppers must be held in place by plaster of paris covered by strong cloth securely tied. The bottles, well cushioned by material that will not be ignited by the acid, must be packed in strong wooden boxes, barrels, or kegs. When the specific gravity of the acid exceeds 1.49, each bottle must be packed in a tightly closed metal container.

(c) Glass carboys, (3), must be well cushioned by material that will not be ignited by the acid.

(d) A glass carboy, (4), containing acid of gravity exceeding 1.43 and not exceeding 1.49, must be well cushioned by incombustible packing material in a tight cylindrical iron case not less than 1-16 inch thick that covers the bottom and sides of the carboy and fits tightly in the outside wooden box.

1858. Mixed nitric and sulphuric acids must be shipped in securely closed iron drums that comply with Specification No. 5, or in tank cars complying with Master Car Builders' specifications; or mixed nitric and sulphuric acids may be shipped in carboys, provided these carboys are placed in a tight cylindrical iron case as prescribed by paragraph 1857 (d), and boxed as prescribed in Specification No. 1.

1867. (a) Any article subject to these regulations, whether label is required or not, must be described on the shipping order under the specific or general name provided for the description of such freight by the carrier's classification and tariff governing."

These regulations were explained by C. P. Beistle, a chemist of twenty years' experience, who had, since 1907, been with the Bureau of Explosives as a technical adviser with respect to the shipment, packing and handling of hazardous commodities, and took part in drawing up the regulations. The Bureau of Explosives is a subordinate body of the Interstate Commerce Commission, is charged with the enforcement of the regulations and is recognized by the Commission in an advisory capacity in preparing them (Rec., 68-70, 77).

Dr. Beistle testified that the meaning of the regulations is that nitric acid of all gravities may be shipped in small glass bottles with ground glass stoppers of a capacity not exceeding seven pounds of acid, i. e., five pint bottles; that nitric acid of a specific gravity less than 1.43 may be shipped in glass carboys well cushioned by material that will not be ignited by the acid; that when the specific gravity is between 1.43 and 1.49,

the acid may be shipped either in glass carboys well cushioned by incombustible packing material, provided that they are packed in tight cylindrical iron cases covering the bottom and sides and fitting tightly in outside wooden boxes, or in the aforesaid small glass bottles with ground glass stoppers well cushioned by material that will not be ignited and packed in strong wooden boxes, barrels or kegs; that when the specific gravity of the nitric acid exceeds 1.49, it can be shipped only in the aforesaid small glass bottles, each bottle packed separately in a tightly closed metal container and well cushioned by material that will not be ignited by the acid, and that nitric acid mixed with sulphuric acid may be shipped in iron drums, or in tank cars, or in glass carboys packed as is required when nitric acid of a specific gravity between 1.43 and 1.49 is shipped, i. e., well cushioned by incombustible packing material in a tight cylindrical iron case covering the bottom and sides and fitting tightly in an outside wooden box (Rec., 75, 81, 82, 84).

The nitric acid manufactured by the importer at its plant in Canada, the subject of the protests here involved, was the strongest made, viz., 89.55 per cent. Its specific gravity was 1.4904 (Rec., 27-28). It will be seen, therefore, that it could have been shipped, without the addition of sulphuric acid, only in five pint glass bottles separately packed in metal containers, and so Dr. Beistle testified (Rec., 84)—both a commercial and a physical impossibility.

If its specific gravity had been less than 1.49 but greater than 1.43, it would still have been both a commercial and physical impossibility to ship it alone in glass carboys, for the glass car-

boys would have had to be packed in steel containers, and there are probably not over 100 of such type of carboy in existence, and they are very expensive (Rec., 82, 81).

And if its specific gravity had been less than 1.43, while it might have been shipped alone in glass carboys (provided enough carboys could have been obtained), it would have been impracticable as a commercial proposition, for the expense would have been very much greater, as a car will hold only about 200 such carboys, thus reducing the car capacity to about 28,000 pounds instead of about 92,000 pounds, the average contents of the fifteen cars involved in this case. Thus the car movement would have been greatly increased (Rec., 74, 75). And Mr. Wollenberg, the importer's general manager, testified that *he had tried to obtain enough carboys, but that he had found it impossible to obtain them* (Rec., 49-50, 57-58).

> *"There is only one practical means of transporting strong nitric acid, and that is to mix it with a sufficient amount of sulphuric acid and ship it in tank cars or drums."* (Testimony of Dr. Beistle, Rec., 84.)

Prior to the opening of the European War in 1914, about 75 per cent. of all the nitric acid that had been transported in the United States was shipped in tank cars with sulphuric acid added; the balance was shipped in glass carboys as straight nitric acid without the addition of any sulphuric acid. There was never any noticeable movement of high strength, i. e., 90%, nitric acid in glass carboys or glass bottles, practically all shipments in glass carboys being shipments

of commercial, i. e., 67%, nitric acid, without the addition of any sulphuric acid (Rec., 81, 82, 78).

The shipments in tank cars consisted of nitrating acids and fortifying acids. Nitrating acids contain from 60% to 75% of sulphuric acid, fortifying acids from 47% to 50% of sulphuric. The former are used directly in the manufacture of nitroglycerine or nitro-cellulose or other nitro explosives, the latter in bringing up to a greater strength spent acids, i. e., mixtures of nitric acid, sulphuric acid and water in which the nitric acid has been decreased by use and the water increased to such an extent that they can no longer be used. No other mixtures of other percentages of nitric acid and sulphuric acid were transported in tank cars prior to the war, and no mixtures whatever containing less than 45% of sulphuric acid (Rec., 71, 72).

The European War caused an enormous expansion in the explosive industry in this country and a tremendous increase in the output and use of both nitric and sulphuric acids. This has necessitated the transportation of nitric acid in large quantities, with the result that inquiries were made of the Bureau of Explosives as to the least amount of sulphuric acid that must be added in order to protect the tank cars. This had not been a practical question theretofore, for two reasons, (1) the movement of nitric acid without the addition of sulphuric acid had not been so large but that glass carboys in sufficient quantity were to be had and (2) shipments of nitric acid and sulphuric acid in tank cars had never contained less than 45% of sulphuric acid, which mixture every one knew was safe to put in steel containers, *there being no commercial use*

for a mixture containing less than 45% of sulphuric acid. During 1918 the Bureau was conducting experiments in order to ascertain the lowest percentage of sulphuric acid that must be added in order to make it possible to transport nitric acid safely in tank cars, but these experiments have not been completed. *But it was the general consensus of opinion that it was necessary to add about 25 per cent. of sulphuric acid by weight in order to protect the iron or steel container and, in the opinion of Dr. Beistle, 20%, the amount added by the importer in the case at bar, was as small a percentage as could have been added with safety to the cars and was even under the limit of safety* (Rec., 72, 73, 74, 81, 83, 84).

H. L. Wollenberg, the importer's general manager, testified that in 1917 the United States Navy wanted some trinitrotoluol in a hurry and combed the country to find the nitrating capacity for producing it, that the importer had the nitrating capacity but no facilities for making the additional nitric acid needed, that it had, however, a nitric acid plant at Drummondville, Canada, which was idle at the time, because its Russian contracts had been completed, and that it agreed to make the nitric acid there and ship it to its plant at Emporium, Pa., and make the trinitrotoluol there, although that involved shipping sulphur from this country to Drummondville in order to make the nitric acid (Rec., 58, 61).

Mr. Wollenberg was familiar with the decisions of the U. S. Board of General Appraisers in the *Benzol Products* and *Nonnabo Chemical* cases, referred to *infra* (T. D., 36,000 and 37,285, G. A., 7828 and 8082), and knew that both nitric acid

and sulphuric acid were free of duty and believed that, as the Board had held in the *Benzol* case, the addition of the minimum amount of sulphuric acid to the nitric acid in order to make it possible to ship the nitric acid in tank cars safely and legally would not make the product dutiable (Rec., 58).

He also knew that it was impossible, both physically and commercially, to ship the quantity of nitric acid needed to make the trinitrotoluol for the Navy, viz., 750 to 1,250 tons per month (Rec., 30, 62), in any way, except in tank cars with enough sulphuric acid added to protect the cars, for the reasons that the enormous number of carboys required could not have been obtained within a reasonable time (in fact, he had tried repeatedly to obtain carboys and could not get them) and the increased car movement, if carboys could have been obtained, would make its transportation in that way commercially prohibitive. In fact, at the time of the trial they were two and a half months behind on beginning the delivery of an order of 700 tons of weak nitric acid per month for the United States Government to be shipped in glass carboys to be furnished by the Government, because the Government had been unable to furnish the carboys (Rec., 57-58, 49-50, 62).

Therefore, Mr. Wollenberg investigated the subject and obtained information from other shippers of nitric acid and gave instructions to add to the nitric acid produced at the Drummondville plant the minimum amount of oleum (sulphuric acid which is supersaturated, i. e., which contains an additional amount of SO_3 gas or 104½% of H_2SO_4 and which, for that reason,

takes up more of the water in the nitric acid than weaker sulphuric acid would, thus necessitating the addition of less sulphuric acid—Rec., 27, 38-39, 46-47), which would insure the safe transportation of the nitric acid in tank cars. Although some people advised using a greater percentage, the amount so decided on was about 20 per cent., as they were using their own cars and wanted to add *the least possible amount.* In fact, the witness doubted whether any one owning a line of tank cars would knowingly lease his cars to be used for this particular mixture, as he would probably fear that the deterioration would be excessive (Rec., 24, 38, 43, 51, 90).

The oleum or sulphuric acid was added solely as a container or as a protector, i. e., solely for the purpose of making it possible to transport the nitric acid in tank cars and for no other purpose. The company did not desire to import anything but the nitric acid; in fact, by the addition of the sulphuric acid the bulk and weight of the importations were increased by that much, so that more freight had to be paid than if it had been possible to ship the nitric acid alone, and thus there was a commercial disadvantage (Rec., 25, 30-32, 40, 45, 51-52, 65).

The company could not use the nitric and sulphuric acids in the proportions in which they were imported, i. e., 20% sulphuric and 72% nitric; in fact there is no commercial use whatever for such a mixture (the commercial mixtures containing from 45% to 70% of sulphuric acid Rec., 32-33, 64, 83). In order to make use of the imported article in the manufacture of the trinitrotoluol it was necessary to add additional quantities of sulphuric acid or oleum

to make the proper nitrating mixture (Rec., 32, 44, 47). As a matter of fact, the company would have preferred to import nitric acid alone, without the addition of any sulphuric acid, if it had been possible for it to do so (Rec., 45).

The nitric acid which the company required in its processes was the strongest that could be made. It could not use nitric acid of 1.43 specific gravity, which could have been transported alone in glass carboys, but only nitric acid of at least 1.49 specific gravity, which could only be transported alone in seven pound glass bottles (Rec., 31-32, 52). And Mr. Waugh, a chemist called by the Government, testified that in the manufacture of explosives the highest strength nitric acid is required (Rec., 99).

The importations in question were invoiced as mixed acids, because of the requirements of the Interstate Commerce Regulations (Pars., 1712 and 1867), which prohibited describing them as nitric acid (Rec., 65-66). *The term mixed acid, however, has now, and had prior to 1913, no definite commercial meaning, it being applied to any mixture of nitric and sulphuric acids, containing at least 45% sulphuric acid. It is always necessary, therefore, when giving an order for mixed acid, to specify the percentages of the two acids desired or to add some descriptive word to the term, i. e., to order nitrating mixed acid or fortifying mixed acid, for, otherwise, the seller would not understand what the buyer desired* (Rec., 35-36, 55-56, 68). *Even the Government's witnesses, Messrs. Klipstein and Waugh, were obliged to admit this on cross-examination* (Rec., 95-96, 99-101).

The Statutes.

Paragraph 387 of the Tariff Act of 1913, under which the Customs Court allowed free entry to the merchandise in question, is as follows:

> "Acids: Acetic or pyroligneous, arsenic or arsenious, carbolic, chromic, fluoric, hydrofluoric, hydrochloric or muriatic, nitric, phosphoric, phthalic, prussic, silicic, sulphuric or oil of vitriol, and valerianic."

Paragraph 5 of the Tariff Act of 1913, under which the merchandise was assessed with duty by the Collector of Customs, is as follows:

> "Alkalies, alkaloids, and all chemical and medicinal compounds, preparations, mixtures and salts, and combinations thereof not specifically provided for in this section, 15 per cent. ad valorem."

POINT I.

The decisions of the Board of General Appraisers in these cases.

In T. D. 36000 (G. A. 7828), Protest of *Benzol Products Company,* the same Board which decided the case at bar held on December 13th, 1915, that nitric acid, imported in tank cars, to which 3 per cent. by value (3.18 per cent. and 3.81 per cent., respectively, Rec. 136) of sulphuric acid had been added "for the purpose of protecting the tank cars from the effect of nitric acid," was entitled to free entry as nitric acid and was not dutiable at 15 per cent, as a chemical mixture. The record in the *Benzol* case was incorporated into the record in the case at bar (Rec., 134-138). The Board made no reference to the

percentage by weight of the sulphuric acid added, although in one of the cars (there were two cars involved) the percentage by weight was 34.95 (Rec., 102). The evidence in the case was very meagre, but it appeared that the strength of the nitric acid was over 72 per cent., that it was not imported in glass carboys because of the expense, that the proportion of sulphuric acid added had no relation to any trade use, and that the importer added much more sulphuric acid (six and one-half times as much more) in order to make a mixture of nitric and sulphuric acids suitable for the purpose for which it desired to use it, viz., the nitration of benzol. Judge Brown, who wrote the unanimous opinion of the Board said:

> *"Had the nitric acid been brought in in certain glass containers, instead of tank cars, it would not have required the sulphuric acid for protecting the containers, but we do not believe that in any proper sense this importation can be called a chemical mixture within the purpose and intent of Congress in enacting these provisions. It is without the spirit of the term 'chemical mixture,' as used in paragraph 5, and for all practical purposes remains nitric acid."*

The Board in this case refused to decide "whether or not sulphuric acid and nitric acid, mixed in substantial proportions for some chemical or trade purpose other than mere protection in transportation, would be free."

The question thus reserved came up before the same Board in the case of *Nonnabo Chemical Company* (T. D. 37285, G. A. 8082), decided on July 20th, 1917, the record in which was also incorporated into the record in the case at bar

(Rec., 156-183). In this case the evidence showed that the contents of the single tank car involved consisted of 48.41% of nitric acid and 47.10% of sulphuric acid, i. e., that it was a typical fortifying acid, that the specific gravity of the nitric acid was about 1.5, so that it could not be shipped alone even in glass carboys (only in glass bottles), and that the reason for mixing the acids in these proportions was that it resulted in the most economical use of the mixture and also made it possible thus to secure nitric acid of the requisite concentration to be used in the factory, and that *the mixture was used as imported* and principally for fortifying exhausted acids so that they might be used again in nitrating cotton to be used in the manufacture of explosives. Judge Brown, who again wrote the unanimous opinion of the Board, held that the merchandise was properly classified as a chemical mixture dutiable at 15 per cent., distinguishing the *Benzol Products* case as follows:

> "As to the first contention, the mixture, forming a distinctly different customs classification, removes this article from the benefits of the free-list provision. It is true that we held in the case of *Benzol Products Co.*, G. A. 7828 (T. D. 36000; 29 Treas. Dec., 763), an appeal arising at the port of St. Albans, Vt., that nitric acid shipped in a tank car, mixed with a negligible quantity (3 per cent. by value) of sulphuric acid, solely for the purpose of protecting the tank car from corrosion, was nevertheless classifiable as nitric acid under the free list provision under the principle *de minimis non curat lex*. But that case is not controlling in the case at bar, because here we have a mixture of substantial proportions, and also because of *the further*

fact that it is used in the form of the mixture and in the proportions as imported for manufacturing purposes, which was not true in the Benzol Products case."

In *34 Treas. Dec.* (Abstract 42132), Protest of *C. J. Tower*, decided May 6th, 1918, the record in which was also incorporated into the record here (Rec., 139-154), the Board followed the *Nonnabo* case and held the importation dutiable at 15 per cent. as a chemical mixture. In this case there was a contract between the exporter, the Grasselli Chemical Company, and the importer that the former should ship to the latter a quantity of mixed sulphuric and nitric acids, containing not less than 49 per cent. of nitric acid and not more than 45.5 per cent. of sulphuric acid by weight, and it appeared that the material as imported contained the two acids in practically these proportions, the nitric acid having a specific gravity of 1.5.

In the case at bar (T. D. 37927, G. A. 8235) the majority of the Board (McClelland and Sullivan) followed the *Nonnabo* and *Tower* cases, where, they said "the mixtures of acids were in substantial proportions," and overruled the *Benzol Products* case (Rec., 194) in so far as it may serve as a precedent to warrant the holding that "where 20 per cent. of sulphuric acid by weight is added to the nitric acid for the purpose of safe transportation, the mixture is free," although they seem to have considered it correct in so far as it permits the addition of 3 per cent. by value of sulphuric acid for the purpose of safe transportation. (But in that case 3 per cent. by value was 34 per cent. by weight and here 5 per cent. by value is only 20 per cent by weight.)

Judge Brown, in his dissenting opinion (Rec., 195-199), very clearly pointed out where the line should be drawn in cases of this character, viz., that where, as in the *Benzol Products* case, *"the sulphuric acid was added merely to protect the tank car and in the quantity or proportions so shipped was not a mixture ready for use commercially without further addition or manipulation, it was not a chemical mixture within the meaning of paragraph 5, but remained nitric acid,"* but where, as in the *Nonnabo* and *Tower* cases, the proportions of nitric and sulphuric acids were such that *"the mixture was a commercial mixture ready for use as such, it should be taxed as a chemical mixture within the meaning of said paragraph 5."*

He also laid emphasis upon the absurd and incongruous result which would follow from the conclusion reached by the majority of the Board, as follows:

> "In the practical commercial circumstances which surround the use, importation, and shipment of nitric acid, we must hold in this case:
>
> "(1) Either that all nitric acid shipped in tank cars, mixed with sulphuric acid, which Mr. Beistle, an expert in the Bureau of Explosives, testified composed about 75 per cent. of the total shipments of all nitric acid in whatever form or strength, and nearly 100 per cent. of the total shipments of strong nitric acid (record, p. 141), was intended by the Congress to be taxed at 15 per cent. as a chemical mixture because of the sulphuric acid necessarily added to thus ship it, and that the remainder, almost a negligible per cent. of strong nitric acid, and about 25 per cent. of the total shipments of both weak and

strong nitric acid, was the only thing intended to be admitted free under the provision for nitric acid.

"(2) Or that both classes are free of duty in spite of the presence of sulphuric acid, if added solely as a necessary protection to the container.

"The latter is the view that the Board has heretofore adopted as the more reasonable interpretation of the words of the Congress which are always to be taken as speaking in the language of commerce and as dealing with the practical affairs of everyday commercial men rather than in the technical terminology of science.

"*A too literal or too narrow construction, then, will not prevail as matter of law, if the consequences of such interpretation produce an artificial or incongruous result foreign to a reasonable purpose in the legislative mind to deal in a sensible way with the practical affairs of business.* The Congress was not intending to play with the rights of the citizens engaged in importing such merchandise, nor dealing with distinctions so nice and so technical that if taken literally they would produce inequalities in the taxation of the same material growing merely out of the kind of container and the incidental protection thereof from danger, in which the merchandise should happen to be shipped."

And, at the end of his opinion, in pointing out that the use of the term "mixed acids" could properly have no bearing upon the correct decision of the case, he said:

"Whatever they call it in their orders, the merchants dealing with this substance, mixed in the proportions here involved, manufacture it, import it, and use it for the purposes for which nitric acid is used in the making of explosives and for no other purposes.

> "Therefore, to classify it because of an expression used in the orders and invoices as 'mixed acids,' a term not used in the act, would be to set up a technical scientific or chemical term as the test of classification rather than the commercial use and practice.
>
> "Moreover, assuming but without admitting that the use of the expression 'mixed acids' in dealing with it would bring it under the term 'chemical mixture,' even then this term would not control its classification, because at the same time, for all practical commercial purposes, it also remains 'nitric acid,' which is the *narrower term*, and as such intended by the Congress to be admitted free."

Unless the language of a statute must always be literally applied, regardless of the absurd and incongruous results that will follow upon such an application, the decision of Judge Brown seems to be correct and in consonance with the well recognized rules of statutory construction laid down by this Court.

POINT II.

The merchandise here involved was in fact nitric acid, or nitric acid with sulphuric acid as a container or a protector for the instrument of transportation. Although, for the want of a better designation, it may be called a mixed acid, it was not a chemical mixture within the meaning of the tariff act.

Throughout its brief the Government assiduously uses the term mixed acid in referring to the article imported and asserts that, as it can not be properly called either nitric acid or sulphuric acid without qualification, it is, therefore,

in fact a mixture and would be called a mixture. In effect its argument is that any article which may be called a mixed acid, although the term "mixed acid" has no definite trade meaning, is, for that reason alone and regardless of all other considerations, a chemical mixture within the meaning of the tariff act.

It may be admitted that if the statute is to be literally applied, if the term "chemical mixture" is to be literally interpreted, any mixture of nitric and sulphuric acids in any proportions and made for any reason, whether accidental or by design, for a trade use or for purposes of safe and legal transportation merely, is a chemical mixture, no matter by what name the mixture may be called. For the Court of Customs Appeals has defined a chemical mixture as a mechanical commingling of two or more chemicals which do not react upon each other and produce a new substance and thereby destroy the identity of the original materials but in which the individual properties and separate chemical natures of the component chemicals are preserved, and nitric and sulphuric acids do not react upon each other.

Strohmeyer & Arpe v. *U. S.*, 2 Ct. Cust. App. 285.
U. S. v. *Kraemer*, 4 Ct. Cust. App. 433.

But, as we shall show *infra*, in Points III, IV and V, the statute should not be literally applied in the case at bar.

And, furthermore, the article here imported is not known by any definite trade name, either mixed acid or any other. Broadly speaking, any mixture of nitric and sulphuric acids in any proportions might be called a mixed acid, but all the

witnesses, both those for the Government as well as those for the importer, agreed that there is no standard article known and bought and sold under the name of "mixed acid," that the term "mixed acid," without qualification, has not, and never has had, any definite meaning in the trade and commerce of this country but is applied broadly to any mixture of nitric and sulphuric acids, containing at least 45% of sulphuric acid (no mixture containing less than 45% of sulphuric acid having any commercial use in the trade and commerce of this country), and in any case would have to be qualified, in order that the one party might know what sort of a mixed acid was intended by the other, either by stating the respective percentages of nitric and sulphuric acid desired, or by describing it as a fortifying mixed acid, which has a well-established meaning and applies only to a mixture containing from 47% to 50% of sulphuric acid, or by describing it as a nitrating mixed acid, which likewise has a well-established meaning and applies only to a mixture containing from 60% to 75% of sulphuric acid, or as a nitro-cotton mixed acid, which has particular reference to the proper mixture used for nitrating cotton (Rec., 32, 35-36, 55-56, 68, 71, 95-96, 100-101).

Thus Mr. Waugh, a Government witness, testified (Rec., 101):

> "Q. You said you bought and sold nitric and sulphuric acids mixed under the name mixed acid, without any further qualification or designation? A. No, the party making an inquiry for mixed acid generally states the percentage of nitric and the percentage of sulphuric required in the mixture.

"Q. In other words mixed acid unqualified has no definite commercial meaning? A. Not unless the percentage is specified of each acid.

"Q. And did not have prior to 1913? A. No, sir.

"By Gen. Appr. McClelland:

"Q. Does it imply a mixture of any particular acids? A. No, just a mixture of the two acids in such proportions as are specified.

"Q. Does it imply a mixture of those two acids—A. Yes, sir, it does.

"Q. Nitric and sulphuric acid? A. Yes, sir, it does."

And Mr. Wollenberg, the importer's general manager, testified (Rec., 54-55):

"Q. Now, has the term mixed acid any well-known and definite commercial meaning? A. So far as I know it has no application to a specific composition of acids, and it would always be necessary in the trade to specify the composition of mixed acid which was under discussion or required or bought or sold.

"By Gen. Appr. McClelland:

"Q. *There is no standard for mixed acid?* A. *There is no standard mixed acid.*

"Q. Every mixture may be different from any other mixture? A. Exactly. In any one particular trade they may always require the same mixture, and in that particular at least they might order some mixed acid from the man who had always supplied them, and he would know what they meant because they had always gotten a certain mixture, but as between two strangers the term mixed acid would only mean that it has sulphuric and nitric in it, and it would have

to be more clearly defined. On the other hand, there are certain limitations of the composition which have been in practical use, in common use, so that the term does apply within certain reasonable limits.

"By Mr. Pratt:

"Q. What are those limitations to which the term does apply? A. I can't speak for all branches of the trade, but as far as my familiarity with the term is concerned it applies to mixtures of nitric and sulphuric of such proportions that the mixture could either be used as a so-called fortifying acid going into a process or as a nitrating acid going into a process, in either of which events it would have a composition in which the sulphuric would be not less than 45 per cent. and varying up to perhaps 75, and the nitric and the water would be accordingly to fill out your 100 per cent."

The article desired to be imported by the respondent was nitric acid and nitric acid only (Rec., 25, 40, 51). There was a cemmercial disadvantage in being obliged to add sulphuric acid to the nitric acid in order to transport it safely and legally, not only because of the added expense involved in shipping from the United States to Canada the ingredients necessary to manufacture the sulphuric acid there and the additional freight upon the sulphuric acid back to the United States but also because of the fact that in the manufacturing of explosives there is an advantage in having the nitric acid alone without the sulphuric acid added (Res., 32, 44-45, 64-65).

In order to transport the quantities of nitric acid required, tank cars of iron or steel had to be

used, for there were not sufficient glass bottles or glass carboys in the entire United States to handle the movement, nor could they have been obtained within a reasonable time, and, if they could have been obtained, the car movement would have been three or four times as great because of the limited number of carboys that can be loaded in a car (Rec. 57-58, 49-50, 62, 74-75). As the Court of Customs Appeals said (Rec., 209):

> *"The testimony fairly tends to show that as a commercial proposition there is only one practical means of transporting strong nitric acid such as that involved in the present importation in quantities sufficient to meet the current demand, and that is to mix it with a sufficient amount of sulphuric acid and ship it in tank cars or drums."*

As nitric acid attacks and eats through the iron or steel of tank cars and as the leaking nitric acid causes fires, the Interstate Commerce Commission has forbidden, under penalty of fine and imprisonment, the shipment of nitric acid alone in anything but glass bottles or glass carboys (Rec., 69-70, 79, 119-120).

When from 20% to 25% of sulphuric acid is added to nitric acid, the resultant mixture does not attack the tank cars (Rec. 26, 73, 136, 138, 173, 43, 51, 74, 84, 90). *The sulphuric acid thus added acts as a protector to the tank cars, as a container for the acid* (Rec., 173, 32, 51).

The importer here added only the minimum quantity of sulphuric acid necessary in order to protect the tank cars and comply with the law—in fact, in its effort to add no more than necessary, it added in some cases less than the min-

imum amount generally considered necessary (Rec., Ex. 1, p. 104).

The product thus transported and imported, although technically a mixture, was, in reality, only nitric acid contained in sulphuric acid and both contained in tank cars. The intention of producing or creating a chemical mixture was absent, although the physical result may have been a mixture. No mixture in a commercial sense had been formed, no new article of commerce had been created. The only uses for the article imported were the same as the uses of nitric acid in the manufacture of explosives, dyestuffs, etc., in which the addition of the sulphuric acid was not a hindrance. As the Court of Customs Appeals said (Rec., 210-212, 218-219):

> "*It is no stretch to say that the word 'mixtures' as here employed was used in a similar sense to import mixtures succeptible of commercial use as they exist, or are at least such as are purposely started on their way toward adaptation to such use.* While not resting this case solely upon this view, it certainly would appeal with great force were it the only consideration involved.
>
> "But over and beyond this, the question arises as to whether this mixture which in a sense was involuntary, it being a compliance with the regulation which made it possible to import the article into this country, was an act of preparation or an act of admixture with a purpose of producing a new article. Obviously it was not such. It was made necessary by the character of the article to be imported, and by the very appropriate and proper rules and regulations of the Interstate Commerce Commission

controlling this shipment. *This was not in any true sense an importation of a mixed acid at all. It is evident that the importer sought to introduce nitric acid and had no desire to import sulphuric acid, or nitric and sulphuric acid as a usable mixture. This small percentage of sulphuric acid, which was relatively insignificant in its money value, was employed solely for the purpose of making it possible to ship the nitric acid into this country in usable quantities. The result was not a mixture merchantable as such for use in the United States.* The article imported had to be subjected to one of two processes: It had either to have the sulphuric acid removed or it had to have an additional amount of sulphuric acid added before it could be usable. But as introduced it had no use until subjected to one or the other of these treatments.

"*Recognizing fully the rule which usually obtains that the condition of an article when imported determines its dutiable status, we think this rule is not infringed by holding this merchandise free goods. The merchandise had not reached the state of a commercial mixture contemplated by the statute. It was susceptible of no use other than as nitric acid, which must before use be again treated. The mixing of this minimum amount of sulphuric acid should be treated as a means of and part of the shipment, and as an act as essential in the importation of nitric acid as would have been proper packing of glassware or other goods designed for shipment by rail. It was an act analogous to the packing of goods for shipment.* Indeed, in one sense it was the packing of goods for shipment, for the testimony shows that the operation of the sulphuric acid was to absorb the water in the nitric acid, leaving it less liable to corrode the tank car than it would if left without this addition. It sepa-

rated the true nitric acid from the water that it contained, and for which the sulphuric acid had a greater affinity, thus making the shipment in safety possible.

"We are, therefore, of the opinion that the introduction of this minimum but essential quantity of sulphuric acid for the purpose indicated is more analogous to the act of packing for shipment than an attempt to prepare a mixture designed for use." * * *

"In the present case we are convinced that there was neither an advantage to the importer in adding the requisite amount of sulphuric acid to admit of safe shipment of the nitric acid nor was there any possible loss of revenue to the Government. The sole purpose for which this addition was made was to admit of shipment. It would be sticking in the bark to say that this was such a mixture as the statute in question contemplates. It is not yet prepared. It has not been advanced as a preparation for actual use except to the extent that a small portion of the requisite amount of sulphuric acid which when added in the proper quantity would result in making a mixture which was usable, is found in this tank instead of some other. The quantity is relatively insignificant.

"A chemical mixture can hardly be held to cover a material compound of a chemical substance with which there has been commingled by accident, and with no intent or purpose of forming a compound for use, a quantity of other material which may in itself constitute a chemical. This might constitute a mixture in the literal sense, as in this case two chemical substances are mixed, but it seems clear that such a mixture is not what is referred to in the statute. What was meant was, as we think, a mixture which is adapted to use as such. True, this mixture is referred to in the record as mixed

acid. Any degree of mixtures would justify this nomenclature, but it is nevertheless neither a usable mixture nor one which the importer purposely, as a process of manufacture, started to make such. It is simply the result of an effort to introduce into this country a quantity of nitric acid. In order to do this the importer was required to add this small quantity of sulphuric acid. *The substance of the transaction was the shipment of nitric acid. In adding this, or by the process of commingling the two, no revenue was lost to the Government, for both were free. It is hardly to be conceived that the Government intended to exclude the introduction of nitric acid in quantities adequate to meet any requirements which the business of the country might require. If not, then it must have been contemplated that the necessary precautions in shipping this nitric acid across the border would be resorted to, and it is hardly conceivable that it was the intention to impose a tax on goods otherwise free which are chemically mixed only for the purpose of observing the requirements of the Government as to shipment.*"

If the term "mixed acid" was a term used in the tariff act and had been proven to have a definite, uniform and general meaning in the wholesale trade and commerce of this country (*Maddock* v. *Magone*, 152 U. S., 368), the imported article would be dutiable as such, unless the article were more specifically provided for elsewhere, as, for instance, under the *eo nomine* provision for nitric acid. But where the term is so indefinite as here and where the term itself is not to be found in the tariff act at all, the fact that the imported article is called mixed acid, as may be all other mixtures of nitric and sul-

phuric acids, has little, if any, bearing on whether either it or they should be brought within the classification of chemical mixtures.

The pertinent question is the commercial meaning of the term "chemical mixture," if it has one, and not of the term "mixed acid," for it is only the meaning of the terms used in the tariff act that may be controlled by commercial usage.

> *U. S.* v. *Walter*, 4 Ct. Cust. App., 95.
> *Stiner* v. *U. S.*, 2 Ct. Cust. App., 347, 349.
> *Revillon Freres* v. *U. S.*, 2 Ct. Cust., App. 209.

The Government made no attempt to prove any commercial meaning for the term "chemical mixture." It relied solely on the fact, not disputed, that in the condition in which the merchandise was, when imported, it was composed of sulphuric and nitric acids.

The article here involved should, therefore, be considered as nitric acid, with sulphuric acid added solely as a container or protector for the tank car. And as nitric acid is included in the free list *eo nomine*, free entry should be allowed to the imported merchandise. The rule is that

> "The designation of an article, *eo nomine*, either for duty or as exempt from duty, must prevail over words of a general description which might otherwise include the article specially designated."
>
> *Chew Hing Lung* v. *Wise*, 176 U. S., 156.

In this case tapioca flour was held to be free as "tapioca," and not dutiable as "a preparation fit for use as starch," assuming it to be a

substance fit for use as starch, the language "fit for use as starch" being so much more general that it was properly qualified by the subsequent paragraph exempting tapioca.

In 1878, many years before the creation of the Board of General Appraisers, the Treasury Department (T. D. 3672) held that where alcohol was not added in sufficient quantity as to make it the component material of chief value and thus bring the merchandise within the provision levying a duty on "all compounds or preparations of which distilled spirits is a component part of chief value," the addition of 15% of alcohol to cherry juice simply for the purpose of preventing fermentation did not change the classification of the cherry juice but it still remained a fruit juice and was properly classified as such.

POINT III.

Though the words of a statute may be broad enough to include a certain thing or a certain act, yet, if absurd results will follow from giving such a broad meaning to the words, the thing or the act will be held not to be within the spirit of the statute and, therefore, not within the statute.

This is a well settled rule of statutory construction and has often been applied by the courts in the interpretation of statutes of various kinds. The reason underlying the principle is best stated by Justice Brewer in the leading case of *Church of the Holy Trinity* v. *United States*, 143 U. S., 457, 459, where, although the statute prohibited the importation of *any* alien under contract to

perform *labor or service of any kind*, with certain specific exceptions not, however, including the rector of a church, it was, nevertheless, held not to apply to the rector of a church.

> "*It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.* This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of *the absurd results which follow from giving such broad meaning to the words*, makes it unreasonable to believe that the legislator intended to include the particular act."

And at page 461, Justice Brewer also quoted from the opinion in the earlier case of *United States* v. *Kirby*, 7 Wall., 482, 486, as follows:

> "'*All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.* The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same

common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, "for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder'."

See also

Lau Ow Bew v. *U. S.*, 144 U. S., 47, 59;
Jacobson v. *Massachusetts*, 197 U. S., 11, 39;
Heide v. *U. S.*, 2 Ct. Cust. App., 399, 403;
Hensel v. *U. S.*, 3 Ct. Cust. App., 117, 119;
Maitus & Ware v. *U. S.*, 6 Ct. Cust. App., 525, 526-7.

POINT IV.

In cases of doubt tariff acts must be interpreted in favor of the importer, as tax acts are interpreted in favor of the taxpayer.

This principle is also so well settled as to need nothing more than its statement and a reference to a few of the authorities, one of the earliest and most frequently cited being *United States* v. *Wigglesworth*, 2 Story, 369 (28 Fed. Cas., 16690), where the question was which one of two tariff

acts imposing different rates of duty applied to importations of indigo. Story, *J.*, said:

> "In every case, therefore, of doubt, such statutes (statutes levying taxes or duties upon subjects or citizens) are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import."

In *Powers* v. *Barney*, 5 Blatchf., 202 (19 Fed. Cas., 11361), where the tariff act provided in one section for the admission of "Peruvian Bark" free of duty and in a later section imposed a duty of 10 per cent. on "Peruvian Bark," Nelson, *J.*, said:

> *"In cases of * * * doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations."*

See also:

Hartranft v. *Weigmann*, 121 U. S., 609, 616;

American Net & Twine Co. v. *Worthington*, 141 U. S., 468, 474;

United States v. *Ullman*, 4 Ben., 547 (28 Fed. Cas., 16593);

Woolworth v. *U. S.*, 1 Ct. Cust. App., 120, 122, and cases there cited.

Maltus & Ware v. *U. S.*, 6 Ct. Cust. App., 525, 528.

And in *Hartranft* v. *Oliver*, 125 U. S., 525, 529, Field, *J.*, said:

> "The intent of the legislature is to be followed even if not strictly within the letter of the statute."

In this last case the court went so far as to hold, in favor of the importer, that imported goods still on board the ship, though in the custody and under the control of an officer of the customs, were in "a public store" or "a bonded warehouse," within the meaning of those terms as used in the Tariff Act of 1883, and therefore not liable to the greater rate of duty to which they would have been liable, if they had been held to be imported on the day of the arrival of the vessel.

In *Goat & Sheepskin Import Co.* v. *United States*, 5 Ct. Cust. App., 178, 183, the Court said:

> "In the presence of an obviously doubtful question of law, this court is bound to construe the statute that the importers, appellants here, shall be accorded the benefit of the doubt."

POINT V.

To classify the merchandise here involved as a chemical mixture produces unjust and absurd results and resolves all doubts against the importer.

Applying the principles referred to in the two preceding points, as the Court of Customs Appeals did (Rec., 220), the merchandise here involved must be classified as nitric acid, or as nitric and sulphuric acids, and admitted free of duty. The contrary conclusion, the one adopted by the majority of the Board of General Appraisers, not only resolves any doubt that there may be as to the proper classification of the merchandise against the importer, instead of in his favor, but also leads to absurd results which Congress cannot be held to have ever intended.

For, although nitric acid is free of duty *eo nomine*, as it is both impossible and forbidden by law to transport it without the addition of sulphuric acid in any form of container other than glass, and as strong nitric acid, i. e., nitric acid of a specific gravity in excess of 1.49 (the kind here involved), can be transported only in glass bottles containing five pints or seven pounds, *each* bottle to be packed in a closed metal container, only importations of small quantities would ever be entitled to free entry. Or, if the strength of the nitric acid should be reduced so that it could be transported in glass carboys, packed either in a tight cylindrical iron case or in incombustible material, according as its specific gravity is greater or less than 1.43, while larger quantities could be transported and would be admitted free of duty, large shipments, shipments in bulk or in tank cars, would never, under such an interpretation of the law, be entitled to free entry.

Thus this unjust and absurd result would necessarily follow, viz., that the small importer of nitric acid, or the importer in small quantities, would bring in his acid free of duty, while the large importer, or the importer in large quantities, would be subjected to a duty of 15 per cent.

In other words, under such an interpretation of the statute, whether nitric acid is to be admittted free of duty will always be dependent upon the manner and method of shipment, upon the kind of container. If the container is glass, the nitric acid is free; if it is of iron or steel, the acid is dutiable, because sulphuric acid must be added in order that the nitric acid may not

eat through the container, destroying it and so terminating its own transportation prematurely.

But the language of the Tariff Act makes no distinction (and should make none) between the small importer and the large importer or between the importer of small quantities and the importer of large quantities, nor makes the rates of duty on the imported article depend upon the kind of container or the method of transportation. Such absurd results as these could never have been intended by Congress nor will they be permitted by judicial construction. When Congress has intended to regulate the rate of duty by the nature of the container, it has always been careful to say so in clear and unambiguous language, as reference to the various Tariff Acts will show.

In *Cassela Color Co.* v. *U. S.*, 6. Ct. Cust. App., 405, 408, it was held that such a construction should be given to Section 19 of the Customs Administrative Act of 1890, providing that the dutiable value of merchandise subject to an *ad valorem* rate of duty should include the value of "all cartons, cases, crates, boxes, sacks and coverings of any kind," as would "*result in a uniform assessment upon the same ad valorem merchandise, whether imported in boxes or barrels.*"

For other cases where the courts have refused to interpret the tariff acts in such a way as to produce absurd, unjust or unreasonable results, see

Arnold v. *U. S.*, 147 U. S., 494.
U. S. v. *Garramone*, 2 Ct. Cust. App., 30.
Hensel v. *U. S.*, 3 Ct. Cust. App., 117.
Heide v. *U. S.*, 2 Ct. Cust. App., 399.

And for cases where the courts have held that there may be circumstances under which imported merchandise, though falling strictly within the letter of a particular paragraph of the Tariff Act, yet is not dutiable thereunder because not within the intent of the law, see

U. S. v. *John Duncan's Sons,* 2 Ct. Cust. App., 380;
U. S. v. *Embossing Co.,* 3 Ct. Cust. App., 220;
U. S. v. *Holland-American Trading Co.,* 4 Ct. Cust. App., 336;
Protest of Wakem & McLaughlin, T. D., 28832, G. A., 6736;
Protest of Gabriel & Schall, T. D., 19628, G. A., 4210, affirmed 99 Fed., 716;
In re Boston Book Co., 50 Fed., 914.

POINT VI.

The Government will really suffer no loss of duty by allowing free entry to the imported merchandise as nitric acid, or as nitric acid and sulphuric acid.

Under Paragraph 387 of the Tariff Act of 1913, quoted *supra,* both nitric acid and sulphuric acid are placed on the free list and allowed free entry. Therefore, assuming that it had been possible to do so, if the nitric acid and the sulphuric acid had been imported separately in separate cars, each would have been admitted free of duty without question. The Government, therefore, loses nothing if both are now admitted free.

To hold the merchandise dutiable at 15% because 20% by weight (only 5% by value) of sul-

phuric acid has been added to the nitric acid, solely in order to make it both physically and legally possible to import the nitric acid, is to impose a duty upon a purely adventitious circumstance.

Nitric acid and sulphuric acid are both crude articles, raw materials for many industries. Mixing the two together does not produce a manufactured article, no extra labor cost is involved, but the product still remains a raw material, and, except when the two are mixed in certain more or less definite proportions (not those here involved), the resultant product is not capable of use in its imported condition as a raw material even, but is capable of use only after more sulphuric acid has been added, or after the two acids have been separated. In other words, to hold the merchandise here involved as free of duty does not contravene the general policy of Congress to impose higher rates of duty upon manufactured or semi-manufactured articles than upon the raw materials.

POINT VII.

The rule that the dutiable classification of an article must be determined by an examination of its condition at the time of importation and is not affected by the motive which actuated its manufacture or importation was not infringed by the decision below.

This rule is undoubtedly well-established but, as this court itself has said, the purpose of the rule is "to produce uniformity in the imposition of duties."

Worthington v. *Robins,* 139 U. S., 337, 341.

As we have shown in Point V, if the merchandise here involved is classified as a chemical mixture, uniformity in the imposition of duties is not produced but, on the contrary, nitric acid imported in glass bottles or glass carboys will be free of duty, while nitric acid imported in tank cars will be dutiable at 15%.

Therefore, while the condition of the article at the time of importation must be considered, that is not the only criterion. If the nitric acid has really become another article of commerce, it should be classified as such, but if there has merely been added to it something necessary in order that it may be safely transported and without which it cannot be transported, it should still be considered nitric acid.

We do not deny that the dutiable classification of imported merchandise is not affected by the purpose of the producer or by the intent of the importer but must be ascertained by an examination of the imported article. A foreigner may manufacture articles or an importer may import articles, in such a way as to evade the provisions of our tariff laws, and solely with that purpose in mind, unless guilty of fraud, but those are very different cases from that of an importer who is compelled by law and the physical exigencies of transportation to pack and import his merchandise in a particular manner The reasons for his so doing can always be shown and should always be taken into consideration in examining the condition of the merchandise at the time of importation and classifying it. In the former case the importer acts of his own free will, in the latter he acts under compulsion.

POINT VIII.

The decision of the Court of Customs Appeals is not in conflict with the Stone & Downer case or with any other authority.

The Government urges in Point VIII of its brief that the decision below is in conflict with a rule which has long had both legislative and judicial approval, but it fails to state the rule alleged to be infringed. Its argument seems to be based upon the proposition that the decision in the case of *U. S.* v. *Stone & Downer Co.*, 175 Fed., 33, is controlling here, and that, as the alcohol was there held not to be a mere vehicle for the belladonna and aconite leaves and roots, so here the sulphuric acid cannot be held to be a mere vehicle for the nitric acid.

But the court was careful to point out in the *Stone & Downer* case that in some cases the primary purpose of using the alcohol as a mere preservative would determine the classification (175 Fed., 38). And it appears to have considered the *Boericke & Runyon* case (126 Fed., 1018), criticised by the Attorney General here, as such a case because of the difference in the facts of the two cases, it appearing in the *Boericke & Runyon* case that the leaves and roots were "surrounded with alcohol for the purpose of keeping them as exactly as possible in their natural condition, and *not for any purpose of changing them,*" while in the *Stone & Downer* case *it appeared that the infusion of the alcohol with the virtues of the belladonna and aconite, "the attaining of which was the purpose for which the importation was made," commenced to be operative from the time that the elements were assembled in the country of exportation,*

continued during the voyage, so that the infusion was partly accomplished on arrival at the port of importation, and was completed in the form of a tincture in this country after arrival.

The Court of Customs Appeals very clearly pointed out the distinction between the *Stone & Downer* case and the case at bar (Rec., 214-218), concluding as follows:

> "for there the commingling of the articles started in force a process by which—*dutiable goods being employed*—their character had been changed so that on importation they could not well have been rated as distilled spirits and brought under the provision of the statute imposing a duty thereon, but had been committed to a *continuing process* which dated back to the first commingling of the alcohol with the belladonna and aconite" (italics ours).

In the case at bar, both nitric acid and sulphuric acid are free of duty, so that there has been no loss of revenue, and no process of change continuing throughout the journey and completed in this country was begun by the addition of the sulphuric acid.

In the *Stone & Downer* case the articles imported were *all* the ingredients of a completed article, *already commingled and in the process of manufacture;* in the case at bar, the articles imported were only two of the raw materials from which the completed article, trinitrotoluol, was manufactured and, although commingled, *were not in any sense in the process of manufacture.*

In the *Stone & Downer* case the importer evidently desired to import both the leaves and stalks and the alcohol; in the case at bar the

importer desired to import only nitric acid, but was compelled to add the sulphuric acid as a container or vehicle for the nitric acid, as a protector for the tank car, the vehicle of transportation.

POINT IX.

There is no difficulty in applying the rule or standard laid down by the Court of Customs Appeals.

The Court below said (Rec., 219-220):

> "We think that the true rule is that the introduction of a quantity of sulphuric acid solely for the purpose of rendering the transportation of nitric acid safe, and which does not result in a usable mixture, is more in the nature of an act of shipment than an admixture and does not produce a substance which is dutiable under paragraph 5.
>
> "The fact that this is called in a sense an acid mixture as would be any acid, no matter what the extent of the substance introduced might be, is not controlling. The only safe line to be drawn is that indicated above." * *
>
> "The fact that this may work some possible inconvenience is not a serious one, for in every case regulations of the Interstate Commerce Commission, it may be assumed, are within the knowledge of the revenue officers, and the proper tests may be made to ascertain the character and nature of the importation as in all cases."

The Government complains in its Point VI that this "fixes no definite standard by which collectors of customs can determine the dutiable classification of mixed acids." But is this so?

The evidence shows that the only usable mixtures of nitric and sulphuric acids, the only ones

having a commercial value and designation, are those containing from 47% to 50% of sulphuric acid (fortifying mixed acids) and those containing from 60% to 75% of sulphuric acid (nitrating mixed acids) and that the transportation of nitric acid is rendered safe by the addition of not more than 25% of sulphuric acid (Rec., 32-33, 83, 74, 84).

The standard to be applied, therefore, is whether the article contains only enough added sulphuric acid to make the transportation safe, i. e., not more than 25%, or whether it contains a greater percentage, say 30% or more. Surely the determination of the percentage of sulphuric acid is not difficult for a chemist, especially between such wide ranges. Many imported articles, especially chemicals, must be analyzed in order to determine their proper dutiable classification and in many cases the analysis is much more difficult than here. Yet, it has never been held that the tariff act was thereby rendered unworkable.

The supposititious case put by the Government at page 25 of its brief is not difficult to answer. *The test is not the purpose for which the importer has imported the article, i. e., whether for his own use as a manufacturer of explosives or for sale to another, but whether the percentage of sulphuric acid is greater than the amount necessary to protect the tank car.* Whether imported for the one purpose or for the other, the dutiability of the article would depend on the percentage of sulphuric acid and on nothing else. And thus the same article imported by one importer would not be free, while a similar article imported by another was dutiable, which, of course, is not and cannot be the law.

Whether the same rule of dutiability should be applied, if sulphuric acid were dutiable, is of no present concern. We are concerned only with the law as at present enacted and in force and not as it may be changed at some time in the future.

In *Buchne Steel Wool Co.* v. *U. S.*, 159 Fed., 107, 109, a similar objection was raised to the classification of steel wool (shaved filaments of steel of varying degrees of fineness manufactured from steel wire) as "articles manufactured from steel wire," but Lacombe, *J*, speaking for the Circuit Court of Appeals for the Second Circuit said:

> "It is suggested that the plain language of paragrapn 137 should not be held to cover this particular article manufactured from wire *because, the identity of the wire being destroyed, it is impossible from mere inspection to determine accurately either its gauge or value.* But this circumstance presents no really serious difficulty. In the case of each importation the collector would, of course, assess duty on the basis of the highest value of wire which the appearance of the article will warrant, and upon the assumption that the gauge was the one usually taken for the manufactue of such articles. If the value were less or the gauge larger, it would be for the importer to inform the collector of those facts by satisfactory proofs."

POINT X.

The judgment of the Court of Customs Appeals should be affirmed and the imported merchandise held free of duty.

Respectfully submitted,

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